UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: ZURN PEX PLUMBING PRODUCTS LIABILITY LITIGATION	MDL NO. 08-1958 (ADM/RLE)
	Courtroom 13 West
	Tuesday, May 26, 2009
	Minneapolis, Minnesota

HEARING ON PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF ELECTRONICALLY STORED INFORMATION

[DOCKET NO. 59]

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

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(3:00 p.m.)

P R O C E E D I N G S

IN OPEN COURT

THE COURT: Good afternoon. Please be seated.

THE CLERK: The matter before the Court is In re: Zurn Pex Plumbing Products Liability Litigation.

Counsel, would you please note your appearances for the record.

THE COURT: Mr. Raiter?

MR. RAITER: Shawn Raiter on behalf of the plaintiffs.

THE COURT: Mr. Rudd?

MR. RUDD: Gordon Rudd.

THE COURT: Mr. O'Neal? Oh, excuse me. I skipped the back. I wasn't looking far enough back, so --

MR. SHELQUIST: Good afternoon, your Honor. Rob Shelquist on behalf of the plaintiffs.

THE COURT: Mr. Shelquist, sorry to overlook you. You're not that small a person. I should have been able to see you back there.

Mr. O'Neal.

MR. O'NEAL: Jim O'Neal for Defendants.

MS. FREESTONE: And Amy Freestone for Defendants.

THE COURT: Good afternoon.

The matter before the Court this afternoon, of

course, is the motion to compel of the plaintiffs of electronically stored information, or ESI, as I guess we're calling it at this point.

Mr. Raiter, I'll hear you in support of your motion.

MR. RAITER: Thank you, your Honor.

THE COURT: Facilitated by a PowerPoint.

MR. RAITER: And the fact that we're here to talk about electronically stored information, I thought I'd bring a PowerPoint, and I actually got it up and running with some assistance from your staff, thankfully.

We're here because Zurn has not searched or produced any ESI in this case. To the extent anything has been produced, it has been in hard copy format. This goes all the way back to an order issued by Magistrate Judge Erickson which told the parties to first focus on hard copy information and then, if necessary and if reasonably efficient in terms of cost and time, to proceed with electronically stored information. We all know in this day and age electronically stored information is prevalent, that's how companies do business, that's how people communicate. That's the purpose of my first slide.

When Zurn was before Magistrate Judge Erickson earlier in the Cox case, there was an affidavit submitted by Ms. Freestone that talked about the cost of searching ESI in this case and producing ESI. What Zurn didn't tell the Court

at that time and it didn't tell the Court until we brought this motion was that since 2004, some of its people have supposedly -- and I put that in quotes because I'm not sure this is true -- been maintaining specific electronic folders of information specifically related to brass fitting failures. It's active data, it's easily accessible and it's already been segregated into information that is relevant to this case.

THE COURT: What do you mean by active data?

MR. RAITER: It means it's still live on the servers. It's not on backup tapes, it's not backed up, it doesn't need to be searched. And as you'll see as I proceed here, what we don't have so far in the case, your Honor, we don't have merits discovery pursuant to Magistrate Judge Erickson's order, we also don't have the names and addresses of warranty claimants, and we don't have any ESI. But what we're looking for in this motion is active information, active data. And if you look at Rule 26 and especially the amendments to Rule 26 following the ESI amendments, there's really a distinction between accessible information and inaccessible information, and what we've asked for here is accessible information. It is information that remains on servers to this day. It supposedly is in Outlook folders, Outlook e-mail system folders. That the actual custodians have decided, in their judgment, to move information into those folders because it relates to brass fittings failures.

So we're not asking for, as you'll see, backup tape searches, we're not asking for metadata, we're not asking for forensic reconstruction. We have not asked, as Zurn indicates in its opposition papers, for all e-mail to be searched, and we have not asked for all J drive documents to be searched. We have asked for two different things. One is the active e-mail and electronic folders maintained by these individuals that they have already said relate to brass fittings failures, and then we asked for a set of search terms to be used on the J drive.

Now, the J drive allows an individual -- the way it works is that an individual has an individual account and then they save things to that account on the J drive, and we have 20 custodians at issue in this case that Zurn has identified with which we do not disagree in terms of who the people are that are likely to have relevant information, and we've asked that Zurn search those J drives. So this is all live information, nothing coming off the backup --

THE COURT: Now, the e-mails that you have already -- that I've seen quoted and that you have talked about are all from third-party sources? Is that how you got those?

MR. RAITER: The vast majority of them are and the ones that we quoted in this most recent brief that brings us here today came only because your Honor compelled Zurn to

provide the name of an individual that they contended was a warranty claimant. Well, it turns out he's a supply house owner, he supplies plumbing fittings to the market, so he sells Zurn's fittings. And we sent a subpoena to him and he produced e-mails, and those e-mails, some of which have been provided to your Honor as part of this motion, are really quite enlightening, in our mind, and they're quite relevant to the issue of class certification because they talk about broad-ranging issues. They talk about notice, they talk about the water defense where their own people are saying: You're not going to be able to defend yourself on the water here because you haven't told anyone about the water and these are failing on city municipal systems and this is normal water. And if you had told us anything about the water and that these fittings would not have been subject to your warranty, we would not have bought one of them.

That's going to be something we're going to put in front of your Honor at class certification. The only way we got that is because we did get an e-mail as part of a warranty claim file that talked about ticking time bombs and we were interested in that e-mail and we wanted to know who sent it, and when we followed up we got these additional e-mails that coincidentally, or maybe not coincidentally, were not even in the warranty claim files that Zurn produced, despite the fact that they told the Court that this person was a warranty

claimant.

So what we see, I believe, as we go forward in this is Zurn kind of picking and choosing what e-mails go into a warranty claim file over the course of the years and there may be some e-mails that are in warranty claim files. There have been some produced from warranty claims files, but what we don't have is the normal internal communication among people within their corporation. We don't have anything that they decided to store electronically. It's not been produced. They've produced an Excel spreadsheet of claims in hard copy format, but it's just a claims spreadsheet of this person had a claim, this is where they lived, but anything we have internal either came out of a warranty claim file or came pursuant to a third-party subpoena.

So the testimony in the case, as we'll see -- I'll try to work through my slides a little bit here -- shows that they have information that they have specifically decided since 2004 related to this problem, it's sitting there right now on their Outlook folders, and yet Zurn will not search nor produce those e-mails under the auspices that it would be overly expensive or too expensive. Well, their entire opposition on expense is premised on doing a full-blown search of e-mail and servers and data that is completely irrelevant to the case perhaps and then reviewing all of that information and having attorneys review it for privilege when in fact

their people have been, according to the testimony, keeping e-mail folders and electronic data folders since 2004 because they anticipated this very litigation.

THE COURT: And how would you suggest that those items be retrieved that would be feasible?

MR. RAITER: They literally can go into -- it's like going into your own e-mail account here.

THE COURT: Produce these folders.

MR. RAITER: Produce the folders. They've already segregated the information for us.

Now, I'm going to try to go through this and I may be jumping around a little bit.

Why is it relevant. They made an opposition that we haven't shown that it's relevant. I would suggest that they've tried to flip the burden here. It's really not our burden to show that this is relevant. They've already moved it over into folders in 2004 saying it's related to brass fitting failures. I think that's a sufficient showing in and of itself. If there's some information within those folders that somehow is not relevant to class certification-related issues, then they can certainly tell us that having searched and having looked at the information, but you can't simply say, "Well, we have these folders and they're not relevant to certification," and when we do see some documents that should have been produced to us, they seem to be very, very relevant

to the issues that we're interested in.

So, why is it relevant. It's relevant to the internal analysis that Zurn has used about the magnitude of the problems, the cause of the problems, the scope of the problems. Again, what we have are warranty claim files where a particular person sends a fitting back and says, "I had a failure." They then send back damages, invoices for sheetrock, carpet, other repair-related issues. Zurn analyzes that failed fitting, typically, and they put it under a microscope and they look at it and they usually say it was caused by aggressive water; therefore, we don't pay it. Now, they sometimes do pay them, but not all the time. That's what's typically in a warranty claim file, and any communication to and from the claimant or the claimant's representatives and Zurn.

Zurn has produced some product information, some product development information, but what they produced were hard copy lab books, so they're literally bound books that the engineers have kept when they have done some testing and some development. Most of it doesn't relate to the brass fittings. Most of it relates to the pipe and the crimp system, but nonetheless they produced those.

But what we don't have from the engineer here, the chief engineer, Gary Runyan, is any communication that he kept electronically, any communication between the business people

and him, other people, outside testing agencies, et cetera, unless it related to a warranty claim. They've drilled it all into warranty claim. So what we don't have is any big global picture of what is happening, why is this happening, where is it happening, what is the cause, and that's why we're at such a disadvantage at this point, because we don't have -- you would normally have that in a case like this. Those issues go to commonality.

We've already produced those e-mails in the brief, your Honor. You can certainly take your time to look at them, but the first one talks about being very concerned about tens of thousands of your fittings that we have installed in municipal water systems in our area, because the fittings that were subject to this particular warranty claim communication were on city water in two different cities in Montana, Kalispell and Big Fork. And so this is the supplier saying: I'm really concerned. If this is really the water, these are failing on municipal water systems and we're really concerned about this.

The next e-mail is from the same person, Mr. Skinn. This is 2006. He's basically saying: You haven't told us the conditions in which these fittings may be used safely, that they won't fail prematurely, and you need to tell us that.

And he goes on and he talks about his experience. He says: We haven't had the problems with other copper pipe

and brass plumbing products that we've had with Zurn, and he talks about them as being catastrophic failure. This goes to the water defense, that it's the water. Here's someone in his market who sells plumbing products, this is his business, and he's saying: It's only your products that are failing, Zurn. It isn't other products.

Now, this apparently, according to Zurn, would not be relevant to class certification. For us it's completely relevant. The reason these are failing is not the water. It is the design, the choice of alloy, and the system itself. Here's one of their own people saying it.

Now we're in 2006 in February. This is Mr. Skinn saying: "I also think that handling these failures and others by claiming corrosive water will be very hard to defend if you cannot tell us and have not told us what water conditions need to be for safe installations." We're going to be before you at some point talking about a uniform failure to warn, a uniform failure to instruct, and an omissions case, and your Honor is familiar with what an omissions case entails. This e-mail will support our position.

The next e-mail, it's even stronger, February of '07, almost a year later, same guy. He says: "At no time when these sales were being made was there any emphasis placed on the exception in Zurn's stated warranty" -- and it then talks about the corrosive water conditions. "The failure to

emphasize the significance of this exception is exactly the reason why Zurn can not walk away from fitting failures. Doing so is simply leaving homeowners, contractors and ourselves to deal with circumstances that no one understood could ever exist. I am absolutely certain that if our customers and/or ourselves had any idea at the time that our local water would be considered as corrosive, thereby causing Zurn's brass fittings to fail, not one brass fitting would have been sold or installed."

Again, not trying to be cute here, but I could hardly have drafted a better e-mail myself with the theory of our case, and this comes from one of their suppliers, and it wasn't produced to us, even though they've told the Court that this person was a warranty claimant. Why that wasn't in the warranty claim file or claim files relating to Montana is a mystery to me. I think the result or the answer is going to be, well, it's because it was never printed and put into the hard copy warranty claim file. It should still exist. I hope we're going to find that it exists on Mr. Sauer's e-mail system or in his folders, because if it doesn't, then we're going to have an issue about spoliation. Now, we obviously have the e-mail, so this particular e-mail isn't going to be the subject of a spoliation issue or motion, but highlights kind of the second part of our motion here, that it appears that they didn't do a very good job of preserving evidence.

THE COURT: But that really isn't before me today.

MR. RAITER: It isn't, but how will we ever know? How do we ever know that we haven't been given the opportunity to have the relevant information even on class certification if they don't have to turn over the data and the information they did keep? We have very good evidence here that this oral hold in 2004 was not very effective.

I've just had filed this afternoon an additional deposition transcript or a portion of a deposition of the regional sales manager for the region that covered Minnesota, Mr. Rick Whitaker. Mr. Whitaker said he didn't know anything about a litigation or preservation hold until 2007 and 2008. This is the person who was covering Minnesota. Minnesota was, according to Ms. Macia's affidavit, the reason why they anticipated litigation. So he's the head regional sales manager for Zurn. He's the only Zurn person other than the vice president of sales who really calls on Minnesota, and yet he didn't know anything about a litigation hold until 2007 or 2008 when, because of the anticipation of the Cox litigation, Zurn issued a written hold.

So, we have Mr. Runyan and we can debate about what Mr. Runyan's deposition testimony says, but it's before your Honor in our motion papers. Mr. Runyan said: I didn't start saving everything until I received the written litigation hold in 2007. And he says: I did save some information and I had

it either in hard copy or I have it electronically. Well, that's our point. If he has it electronically, he's the head engineer who developed this product, who tested this product, who was in charge of trying to figure out why the product failed, and he's got electronically maintained information that's relevant to the brass fitting failures, they should be produced to us. That information should be in our hands so we know what their main engineer was saying. Now, if it turns out that he didn't save it -- and I suspect we're going to find that some of these people don't have information going back to 2004, just like Mr. Whitaker said he won't, because he didn't maintain it, then we have a spoliation issue and then we'll be able to come to your Honor and raise that issue with you. But by not being required to even search or produce their electronically stored data, we can never prove up a spoliation case even though we have very good evidence here, we think, that they did not do a good job preserving evidence. Whether that raises or rises to the level of a spoliation sanction I don't know yet, because we don't know what's there and what isn't there, but that's our point. That's why we keep asking for it.

So, moving through these e-mails, I really talked about the first two -- actually the first point. It's already been segregated into the ESI. We know that. The testimony is from the Zurn corporate representative that certain people

have electronic folders. Some told me that individually, some did not, but we know according to Zurn's corporate representative that they have information that's supposedly related to brass fitting failures that should have been maintained since 2004. We'll see if it has or it hasn't.

So, what's perplexing about Zurn's position here to the plaintiffs is that if this information was available in hard copy, I think we would have gotten it. It's not that the information isn't relevant. There's been no claim that a particular category of information would not be relevant or that could not be discoverable for some reason, but simply that we choose to maintain it electronically and we persuaded Magistrate Judge Erickson that it would be burdensome to produce that at the early stages of this litigation and therefore you don't get it. I mean, if this e-mail or these e-mails that I just presented to you were in a warranty claim file, I believe they would have told us that they were subject to discovery. We would have them if they had been printed out and put into a claim file, so it makes no logical sense to treat this information any differently.

The case law on ESI is very clear that you treat that information differently if it is inaccessible. In other words, you can't get to it without great expense. **Zubulake** and all those cases, that's what they're -- they're making a distinction between accessible and inaccessible. All of this

is accessible by any definition. It's all live, it's not backup tape, it's searchable. We asked the IT person at deposition whether it was searchable, whether it was easily searched. I asked him those questions. He said yes. And what we get in response is the allegation that we've asked for them to search and produce everything that they possibly have. Well, that's not what Mr. Rudd's letter said. We attached his April 7, 2009 letter, and his letter said: We want the Outlook folders that your people maintain, the 20 custodians, and we want you to search the J drive using the search terms that we provided to you, and they responded back saying: No, we're not going to give it to you. Try again. And at that point I sent an e-mail saying: No, I'm not going to guess what is -- what you deem acceptable. We need to get this issue before the Court, and that's what we've done.

So, the preservation issue they claim is irrelevant, shouldn't be in this motion or shouldn't be relevant to this motion, but what we've learned through the testimony is that this oral hold, which was never followed up on from what we can tell either orally or in writing until 2007, did not get to some of the key people. It didn't get to Mr. Whitaker, Mr. Runyan wasn't preserving all of his information.
Mr. Morgan when he started as the warranty claims person in February of 2007 wasn't told about this. He started preserving later that year once he got the written hold. So

there's evidence that there's a problem here, that we don't have everything, and that's why -- oh. We also have IT never being instructed about the hold. Ms. Macia never told them. They never changed their practices. So someone could delete information and Zurn doesn't know if they did or didn't. Now, we can find out if we do forensics on their servers. We can figure out whether someone's been deleting information. We've not asked to do that yet, but that's certainly something we can do, but Zurn can't tell us whether Mr. Runyan, Mr. Sauer, Mr. Whitaker, was off-loading relevant information for some reason and deleting it, because they didn't do backup preservation until 2007 once the written litigation hold went out.

So, we've raised this issue simply because we can't prove any spoliation unless we really know what's left, and we believe that if these folders show that they were not preserving information in '04 and '05 and '06, there's pretty good evidence here that their preservation was inadequate at a minimum and may rise to the level of requiring sanctions at some point once we proceed.

So, what should we do? We're going to be before you at the end of the year asking you to certify a class. As it stands right now, we believe we don't have what fairness would require in terms of written discovery from Zurn. We don't have their internal analysis, we don't have their internal

communications, we don't even have communications coming from the outside in or the inside out. I'd love to see what Mr. Sauer said about these e-mails. I'd love to see what his response was internally or what his response was even to the customer or the supplier, because that's not been produced to us. The supplier didn't have any more than what they produced.

So, we're here because it's not burdensome. They've made it clear that it's live, it's accessible. There's no reason to even talk about expense. The case law makes very clear that when it is accessible, the expense to produce that information is theirs. They chose how they were going to store the information. They anticipated litigation in 2004. They, according to their general counsel, expected that we might be here in some litigation format, and the fact that they maintain this information electronically should not operate to prejudice us on the other side of the case. Again, there's plenty of case law that talks about that. I'd be happy to provide it to the Court if the Court likes.

Thank you.

THE COURT: All right. Thank you, Mr. Raiter.

Mr. O'Neal, I'll hear the response of Zurn.

MR. O'NEAL: It's our position that this motion comes too late. They ask for too much and it is not necessary or reasonably required for this Court to have in order to

resolve class certification, which since the beginning of this case we've been wanting to get to.

First of all, let me clear up a couple of things. The request was not simply for the segregated e-mail folders to the extent that they exist. In his letter of March 31, 2009, which is attached to our papers, Mr. Rudd said they want us to give the custodial e-mail files for 20 custodians and he attached a list of key words that he wanted searched in each e-mail as well as the shared servers.

The shared servers, I don't know if your Honor is familiar, basically -- and I'm no expert on this stuff, but basically, you can have shared drives where people from all over the company can put stuff in there and Zurn has a J drive and a K drive, so those would be the shared servers. And the K drive is the real big scenario, because that has 313 gigabytes or something like that, so that's a huge repository of information if we're talking searching the K drive.

Now, Mr. Raiter didn't mention the K drive, so I don't know if he's dropping that part of it. I don't know if he's dropping other things, but the key word search that they asked us to do includes words like "brass," "bronze," "copper," so that every document that contains one of this list of key words would have to be pulled from the server, somebody would have to read the document, make a determination whether it's responsive. If it's determined it has to be

responsive, it has to be reviewed for privilege. The way that we at Faegre & Benson do it, which I think is pretty common, is, we have relatively low-cost, contract lawyer-type personnel doing the initial responsiveness review, but that has to be QC'd by our own internal personnel. Then privilege determinations are made by Faegre & Benson personnel, ultimately reviewed by someone like Ms. Freestone or someone else, a privilege log has to be created, and the documents have to be Bates-numbered, they have to be coded, et cetera. So, this is hardly a matter, as suggested by the plaintiffs, of pushing a button and it's all there. All of this has to be done or, you know, there's a potential that defense counsel can be accused of malpractice for not doing those things.

The other thing I'd like to clear up, there have in fact been lots of e-mails produced by us. The very -- I'm not sure if they all were produced, although it seems like they were, that Mr. Raiter showed you. I know some of them were, because we were here in court arguing about whether we had to disclose the name of Craig Skinn, whose name was on one of those e-mails that was from our set or the name wouldn't have been redacted, so I know that we produced a substantial number of e-mails. It is true we have not produced everything and that's what I want to talk about now, because it's kind of *déjà vu* all over given. This is exactly what we talked about with Judge Erickson in October of 2007.

E-discovery is a huge issue with the courts because technologically, companies all over are keeping such a vastly increased store of information. That's not Mr. Raiter's fault, it's not our fault, it's just the fact. Companies all over are keeping this vast quantity of information. As a result, the costs of litigation are skyrocketing and it's hard to defend a case now with a substantial amount of ESI production with defense costs less than seven figures. That imposes, it seems to me, on us as lawyers, both sides, and on courts a need to aggressively manage these things and say we're not just going to say, well, all the documents have to be produced. We have to figure out the expense and what's relevant and what's needed.

And as I suggested to Judge Erickson in October of 2007, maybe we should phase discovery and resolve an important issue that might lead to who knows what. It might lead to settlement. It might lead to a substantial reduction in the size of the claims. So let's talk about phasing and let's talk about tailoring discovery so that it is reasonably helpful to the Court and gives the Court what it needs to decide whether the elements of Rule 23 are met, that is, commonality, individuality versus common issues, superiority, all those things your Honor is familiar with. And you don't need to look at every e-mail. As we say in our brief, you don't necessarily need to have whatever zingers the plaintiffs

think they can come up with in the e-mail trotted before you, because we're not litigating the merits, first, if we enter into phased discovery. We're litigating class certification.

It would seem to me that if I were the judge, I'd be saying, well, what do I need to decide class certification? I need to know what are the claims and what type of evidence is going to be produced by each side to support the claims and whether I can hear a trial on those claims and come out with a judgment that can fairly resolve the whole matter, or are the individual issues such that I can't do that and we have to look at each individual plumbing failure and see was there an installation problem, was there a water issue, was there a manufacturing defect issue, and evaluate that differently for different cases such that we can't do that.

Now, it seems to me -- and this is what I told Judge Erickson -- that in resolving class certification you don't need a whole bunch of e-mails. You need to know, well, what are the claims and what are the experts going to say, so we've been focusing discovery on those kinds of points and we've had a lot of expert work done on both sides and that's what we're going to be getting into over the course of the summer if we're not delayed. But if you say we need to look at every e-mail, we can do that, but it's going to add substantially to cost, it's going to add substantially to time, and it's not consistent with what Judge Erickson said or with the passage

of time since then, because we have the fact discovery cutoff of June 15th.

The request from Mr. Rudd for the names of the custodians that received the litigation hold in 2007 came in in early April, about two months before the fact discovery cutoff. We've been litigating this case actively and doing depositions and producing documents.

By the way, we are not holding a bright line saying automatically ESI is out and a hard copy is in. We produced electronically kept information from the Ixtapa sales database. We produced spreadsheets that were electronically kept relating to the numbers of claims. But what we said is the real money, the costs, is in doing a massive search of e-mails, shared drives, and then having to review all of that when it's really not necessary for the basic principles of class certification.

If indeed all of this evidence was so relevant to class certification, I don't think we'd be here now hearing this motion less than a month before the fact discovery cutoff for class certification. We've given your Honor estimates about the amount of time it could take us to review, you know, if everything were ordered produced, and I'm hopeful, one, that under no circumstances would that happen, but, two, that we could reduce it by deduplication and some other techniques you can do, but nevertheless, we'd clearly be

talking months in order to do this and I don't see how we can do that consistent with a June 15 discovery cutoff on class certification.

I do not -- as your Honor says, spoliation is not what is in front of you. More and more in the cases I defend I see plaintiffs very anxious to go there and to find spoliation issues where in my view often none exist. It's almost a Catch-22. In this case we were subject to a rather aggressive pursuit of documents which we believed were subject to attorney-client privilege and work product. In defending that we indicated, as was correct, that in 2004, because of an increasing number of claims from Minnesota, we thought the likelihood of litigation might be more likely than otherwise, and now they turn around and say: Oh, now you should have been preserving documents, which in fact we were.

Now, the scope of the duty and whether a duty exists depends on the particular circumstances of the case. In 2007 we were told: I'm Shawn Raiter, I'm about to sue you with a class action, and a written hold went out with certain instructions which to my knowledge have not be criticized or attacked.

In 2004 we didn't have that. We had a variety of plumbers, one plumber in particular, Mr. Tom Hills, saying: I've got a lot of these failures and need to pay for them. And the number in Minnesota was so much different than

anywhere else in the country that the view was we could get sued here. We better get some experts and look into these things.

Under those circumstances, it seems to me, telling the key employees, "Make sure you keep these documents" was an entirely reasonable response, but that's not really, as your Honor said, what we're here to talk about. If some day we produce documents in the future on the merits of the claims and they have some reason to think documents were destroyed, we can come back here, but remember that since the lawsuit in 2007 we've got a written document hold which has not been attacked by anybody, so we can argue about those things sometime in the future if necessary.

Right now we should be focusing on class certification, and while that's an extremely important issue requiring this Court to look hard at the case, it does not require the Court to consider the merits of a defect issue or a negligence issue. It only requires the Court to consider the nature of the claims that are being made, the evidence to be submitted, and whether the Court can reasonably resolve the litigation with a single common-issue trial.

As we say, we believe this motion is untimely, unnecessary, should have been brought a long time ago if it was going to be brought, and this case should not be delayed any more than it already has been.

Unless your Honor has any questions, I'm done.

THE COURT: No, I think it's been well briefed and well argued.

Mr. Raiter, I'll give you a moment or two in rebuttal, and I think it would be helpful if you'd kind of direct your comments to the untimely and the burdensome arguments.

MR. RAITER: Sure, your Honor.

We're not asking for any change to the schedule, number one. Plaintiffs don't request one, don't think one is needed. If they have a lot of information and it is indeed burdensome to review the information, it kind of proves our point, that they're sitting on a bunch of relevant information that we don't have nor will your Honor have when you're asked to make really what is the most important decision in the case, which is the Rule 23 decision. So, because Rule 23 is always something that you can come back and revisit, what we don't want to have happen is, we make some decision on Rule 23 on either a complete record or an incomplete record, later on in discovery we finally get some information and we have to come back for some reason. It makes no sense to not do this now.

The timing of it, you issued PTO 3 on February 24, 2009. On March 9, 2009, Mr. Rudd tried to get together with Ms. Freestone to talk about who the custodians of information

were that received the hold. On March 12, 2009, Ms. Freestone responded back to Mr. Rudd. On March 24, 2009, I took the IT person's portion of the 30(b)(6) deposition on spoliation. On March 31, 2009, Mr. Rudd correspond with Ms. Freestone. On April 7, Mr. Rudd clarified the request and said: We want the Outlook folders and we want you to search the shared files using these terms.

THE COURT: What about that point of the difference between the two shared drives, the J drive and the K drive? Have you dropped the request for the K drive?

MR. RAITER: For purposes of this motion I would.

THE COURT: Okay.

MR. RAITER: So what we would request are the Outlook folders that are active and were maintained by employees specifically relating to brass fitting failures, which is what we've asked for, and second, that they search the J drive for the same 20 custodians and use the search terms that we have requested.

THE COURT: How many search terms have you requested, roughly?

MR. RAITER: It's maybe -- Mr. Rudd, it looks like he's counting. Maybe 20. They're variations on -- you'll see. Stress corrosion cracking. There's some acronyms for the test labs, acronyms for stress corrosion cracking, brass bonds --

MR. O'NEAL: I have a copy of it --

THE COURT: Okay. I just want to see the rough --

MR. O'NEAL: It's attached to the papers.

MR. RAITER: It's attached to Mr. Rudd's letter, which I believe is --

THE COURT: Okay. I'll look at it.

MR. RAITER: -- Exhibit O or P of my moving papers.

So, again, it's active data, this is not inaccessible, the burden is not great. Again, the way they maintain the information is their problem, not ours. This is not us asking them to go back and search backup tapes. We're not asking them to search metadata or produce metadata. They knew in 2004 that they may have a problem. They had a duty at that time -- **Zubulake** makes it clear, as do all these other cases -- that they needed to preserve it, and if they didn't preserve it in an accessible fashion, it was their issue, not ours.

So, we're here -- again, Rule 23, I don't disagree with Mr. O'Neal on some of the general issues on Rule 23, but I do know that defendants will come forward -- and it's an increasing trend right now -- and argue more about the merits and more about what is actually needed to be proved in the case at trial and how the case would be tried, and because of that increasing trend to really attack the merits of the case and not just focus on the claims, we believe it's imperative

that we have this information. We still don't have their internal analysis of what is happening, we don't know what they really think about this, and that is the most telling information in most cases, what are internal admissions within a company or party admissions, and we think that without those in this case we would be severely prejudiced and we'd have an incomplete record, which I believe the Court doesn't want to have when you make that important decision. You should do it on a full and complete record, do it on the relevant information. If it turns out these e-mails aren't relevant to class certification, you can either tell us that or we won't even include them in the brief, hopefully.

THE COURT: Okay.

MR. RAITER: Thank you.

THE COURT: All right. I think I've got the lay of the land here and I will get you an order as soon as I can.

Thank you.

(Proceedings concluded at 3:40 p.m.)

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C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE,** Official Court Reporter for the United States District Court, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes, taken in the aforementioned matter, to the best of my skill and ability.

/s/ Timothy J. Willette

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